Supreme Court, U.S.
FILED

(1)

97 938 DEC - 2 1997

OFFICE OF THE CLERK

NO.

In the Supreme Court of the United States

OCTOBER TERM, 1997

GERALD LEE ROGERS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

DONALD W. MacPHERSON
Counsel of Record
The MacPherson Group, P.C.
3404 W. Cheryl Dr., #A-250
Phoenix, AZ 85051
(602) 866-9566

66 pp.

QUESTIONS PRESENTED

I. WHETHER UNDER *HALPER* and *HUDSON* (PENDING) PETITIONER'S CONVICTION VIOLATES THE DOUBLE JEOPARDY CLAUSE WHERE, PRIOR TO INDICTMENT, AGENTS OF THE U.S. GOVERNMENT SEIZED PETITIONER'S MINING EQUIPMENT, BANK ACCOUNTS, AND OTHER PROPERTY AND THUS PUNISHED PETITIONER.

II. WHETHER PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL OR DUE PROCESS WHERE, UNKNOWN TO PETITIONER AND THE COURT, HIS ATTORNEY TESTIFIED AGAINST PETITIONER BEFORE THE GRAND JURY WHICH INDICTED PETITIONER.

III. WHETHER THIS COURT SHOULD SETTLE THE ISSUE OF THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DURING GRAND JURY PROCEEDINGS, WHERE AN INDICTMENT AGAINST PETITIONER WAS IMMINENT AND, WITHOUT KNOWLEDGE OF PETITIONER AND THE COURT, PETITIONER'S COUNSEL TESTIFIED AGAINST PETITIONER.

IV. WHETHER, UNDER THIS COURT'S DECISION IN *TOWNSEND V. SAIN*, PETITIONER IS ENTITLED TO FORENSIC TESTING, DISCOVERY, AND AN EVIDENTIARY HEARING AFTER ESTABLISHING THROUGH SWORN, UNCONTROVERTED TESTIMONY THAT PETITIONER'S TRIAL TRANSCRIPTS WERE ALTERED SUBSTANTIALLY TO ACCOMMODATE THE AFFIRMATION OF HIS CONVICTION ON DIRECT APPEAL.

TABLE OF CONTENTS

	PAGE NUMBER
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	vi
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Overview	2
B. Facts	3
1. Pre-Indictment Punishment	3
2. Conflict/Ineffective Assistance of Counsel/ Government Interference With Counsel	5
3. Altered Trial Transcripts	8
REASONS FOR GRANTING THE WRIT	8
I. THE HOLDING OF THE TENTH CIRCUIT THAT PETITIONER IS NOT ENTITLED TO A DOUBLE JEOPARDY EVIDENTIARY HEARING IS CONTRARY TO DECISIONS OF	9

THIS COURT; THIS COURT RECENTLY HEARD AND WILL SOON DECIDE THE PRE-INDICTMENT CIVIL PENALTY/ DOUBLE JEOPARDY CASE OF HUDSON, WHICH DECISION SHOULD CONTROL THE DECISION OF THIS CASE.

A. The Tenth Circuit Decision 9

B. Overview 9

C. Law and Argument 10

II. THE HOLDING OF THE TENTH CIRCUIT THAT PETITIONER CANNOT BE HEARD TO COMPLAIN ABOUT PETITIONER'S ATTORNEY TESTIFYING AGAINST PETITIONER BEFORE THE GRAND JURY WHICH INDICTED PETITIONER IS CONTRARY TO DECISIONS OF THIS COURT. 12

A. The Tenth Circuit Decision 12

B. Overview 13

C. Law and Argument 16

1. Prosecutor's Intentional Interference With the Right To Counsel. 16

2. Due Process Violation; Government's Method Offends a "Sense of Justice." 21

III. THIS COURT SHOULD SETTLE THE ISSUE OF THE RIGHT TO COUNSEL DURING GRAND JURY PROCEEDINGS WHERE THE PETITIONER'S INDICTMENT IS IMMINENT AND WHERE, WITHOUT KNOWLEDGE OF PETITIONER AND THE COURT, PETITIONER'S COUNSEL TESTIFIED AGAINST PETITIONER. 22

IV. THE HOLDING OF THE TENTH CIRCUIT THAT PETITIONER IS NOT ENTITLED TO A *28 U.S.C SEC. 2255* EVIDENTIARY HEARING IS CONTRARY TO DECISIONS OF THIS COURT AND CONFLICTS WITH DECISIONS OF THE TENTH CIRCUITS WHERE A PETITIONER HAS PRESENTED EVIDENCE SUPPORTING HIS CLAIM OF: (1) PRE-INDICTMENT CIVIL PENALTIES/ DOUBLE JEOPARDY; (2)LACK OF CONFLICT FREE EFFECTIVE ASSISTANCE OF COUNSEL; AND (3) ALTERATION OF TRANSCRIPTS. 24

A. The Tenth Circuit Decision 25

B. Overview 25

C. Law and Argument 26

1. Procedural Due Process 26

2. Right to Evidentiary Hearing 28

SUMMARY AND CONCLUSION 29

CERTIFICATE OF SERVICE 31

APPENDIX A 1a-7a

APPENDIX B 1b-17b

APPENDIX C 1c-2c

TABLE OF AUTHORITIES

CASES	Page
Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)	16
Cuyler v. Sullivan, 466 U.S. 355, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)	13, 14,16,17
Escobedo v. Illionois, 84 S.Ct. 1758 (1964)	20
Estes v. U.S., 883 F.2d 645, 649 (8th Cir. 1989)	29
Fontain v. U.S., 411 U.S. 213, 215 (1973)	28
Hardy v. United States, 375 U.S. 277, 84 S.Ct. 424, motion for modification den. 376 U.S. 936, 84 S.Ct. 790 (1964)	26
Hendeison v. US, 948 F.2d 704 (11th Cir. 1991)	29
Hudson v. U.S., ___ U.S. ___ No. 96-976	9,12
Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877 (1972)	13, 22,23,24
Machibroda v. U.S., 368 U.S. 487, 82 S.Ct. 510, 7 L.Ed.2d 473 (1962)	17,19

Massiah v. U.S., 84 S.Ct. 1199 (1964) 20

Miranda v. Ariz., 86 S.Ct. 1602 (1966) 20

Moran v. Burbine, 106 S.Ct. 1135 (1986) 21

Murchu v. US, 926 F.2d 50, 57 and n. at 12 (1st Cir.), *cert. den.* 112 S.Ct. 99 (1991) 29

Rochin v. California, 72 S.Ct. 205 (1952) 21

Sanders v. U.S., 373 U.S. 1, 19-21 (1963) 28

Schillinger v. Hayworth, 70 F.3d 1132 (10th Cir. 1995) 17

SEC v. Rogers, 790 F.2d 1450 (9th Cir. 1986) 5

Stokes v. US, 652 FL 1,2 (7th Cir. 1981), *cert. den.* 464 US 836 (1983) 29

Strickland v. Washington, 466 U.S. 668, 684-85, 105 S.Ct. 2052, 2062-63, 80 L.Ed.2d 674 (1984) 13, 16,21

Townsend v. Sain, 372 U.S. 293 (1963) 9,10, 12,29

U.S. v. Barnes, 662 F.2d 777, 783 (DC Cir. 1980) 29

U.S. v. Bartholomew, 974 F.2d 39, 41 (5th Cir. 1992) 29

U.S. v. Blaylock, 20 F.3d 1458 (9th Cir. 1994) 29

U.S. v. Carillo, 902 F.2d 1405 (9th Cir. 1990) 26

U.S. v. Essig, 10 F.3d 968, 976 (3rd Cir. 1973) 29

U.S. v. Halper, 490 U.S. 435 109 S.Ct. 1892 (1989) 10, 11,12

U.S. v. Hearst, 638 F.2d 1190 (9th Cir. 1980) 17, 18,19

U.S. v. Henry, 100 S.Ct. 2183 (1980) 19,20

U.S. v. Lopez, 4 F.3d 1455 (9th Cir. 1993) 19

U.S. v. Marr, 856 F.2d 1471, 1472 (10th Cir. 1988) 29

United States v. Preciado-Cordobas, 923 F.2d 159 (11th Cir. 1991) 27,28

United States v. Preciado-Cordobas, 981 F.2d 1206, 1212 (11th Cir. 1993) 27,28

U.S. v. Rogers, 751 F.2d 1074 1977 (9th Cir. 1985) 6,7

U.S. v. Rogers, 960 F.2d 1501 (10th Cir. 1992), cert. denied, 113 S.Ct. 817 (1992) 1

U.S. v. Rogers, 636 F.Supp. 237, 253 (D.C. Col. 1986) 15

U.S. v. Rogers, 642 F.Supp. 934 (D.C. Col. 1986) 14

United States v. Selva, 559 F.2d 1303 (5th Cir. 1977) 27

U.S. v. Shenberg, 89 F.3d 1461, 1466-68 (11th Cir. 1996) 7

United States v. Stefan, 784 F.2d 1093 (11th Cir. 1986) 28

U.S. v. Ursery, 116 S.Ct. 2135 (1996) 12

Wood v. Georgia, 450 U.S. 261, 271, 101 S.Ct. 1097, 1103, 63 L.Ed.2d 220 (1981) 16

U.S. CONSTITUTIONAL PROVISIONS

Fifth Amendment to the United States Constitution 2,3,9,16 24

Sixth Amendment to the United States Constitution 2,3,9,10 13,14,17,19 24,27,28,29

STATUTES

28 U.S.C. § 753 2,8,26

28 U.S.C. § 1254 2

28 U.S.c. §1291 3

28 U.S.C. §2255 1,2,3,9, 10,13,14,17, 19,24,27,28, 29

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Gerald L. Rogers (Petitioner), respectfully requests that a Writ of Certiorari be issued to review the "Order and Judgment" of the Tenth Circuit Court of Appeals entered on September 3. 1997.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the 10th Circuit is an unpublished "Order and Judgment" and is reprinted in Appendix A hereto. The opinion and order of the District Court is reprinted at Appendix B hereto.

JURISDICTION

In 1984, Petitioner was indicted in the United States District Court for the District of Colorado with 30 counts of securities fraud and other charges in connection with two mining tax shelters in French Guiana and Canada. Petitioner was convicted at jury trial in 1990. On direct appeal to the Tenth Circuit Petitioner succeeded in reversing the French Guiana counts on grounds of collateral estoppel, but his resentence resulted in the same 25-year term of imprisonment as the first sentence. *U.S. v. Rogers*, 960 F.2d 1501 (10th Cir. 1992).

In 1994, Petitioner filed a *28 U.S.C. Sec. 2255* petition to vacate his conviction based upon, *inter alia*, double jeopardy, ineffective assistance of counsel/disloyalty of counsel/ governmental intrusion in the right to counsel, and altered transcripts.

Petitioner requested an evidentiary hearing based upon uncontroverted declarations made under penalties of perjury. Relief was denied by the District Court and Petitioner timely appealed. On September 3, 1997, by an unpublished "Order and Judgment," the Tenth Circuit affirmed the District Court's decision. The jurisdiction of this Court rests upon *28 U.S.C. 1254(1)*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of law at issue are the United States Constitution, Fifth and Sixth Amendments - and 28 U.S.C. §§ 753 and 2255. These provisions are reprinted at Appendix C hereto.

STATEMENT OF THE CASE

A. OVERVIEW

By uncontroverted declarations made under penalties of perjury, Petitioner requested a *28 U.S.C. Sec. 2255* evidentiary hearing, claiming that:

1. Pre-indictment, the U.S. government seized Petitioner's mining equipment, bank accounts, and other property, thus punishing Petitioner before commencement of these criminal proceedings.
2. During the proceedings of the grand jury which indicted Petitioner, and unknown to Petitioner until several years after the fact, Petitioner's lead counsel testified against Petitioner and was represented by Petitioner's second attorney.
3. Petitioner's trial transcripts were altered.

Thus, Petitioner claims that the government's non-judicial pre-indictment seizure constitutes punishment for purposes of the double jeopardy clause of the *Fifth Amendment*; that the incriminating secret grand jury testimony of Petitioner's counsel violated his *Sixth Amendment* right to counsel and his *Fifth Amendment* right to due process of law; and that trial transcripts were altered. Petitioner filed a petition to set aside his conviction under *28 U.S.C. Sec. 2255* and requested an evidentiary hearing on these issues, which request was denied by the District Court. The Tenth Circuit had jurisdiction under *28 U.S.C. Sec. 1291* and affirmed.

B. FACTS

1. Pre-Indictment Punishment

This case spans over fifteen years and three separate federal prosecutions: a civil Securities and Exchange case brought in California in 1980, a criminal tax case brought in California in 1982, and the subject indictment, a criminal Securities and Exchange Commission (SEC) case brought in Colorado in 1984. Prior to the return of the Colorado indictment, the government, according to Petitioner, utilized a friendly sovereign - Canada, in a self-help effort which resulted in seizure of mining equipment, bank accounts, and millions of dollars in other property. Thus, Petitioner found himself financially punished well before return of the indictment.

Because Petitioner was incarcerated and represented by court-appointed counsel on direct appeal, it

was not until June of 1993 that Petitioner first received and reviewed the Colorado trial transcripts and discovered substantial alterations and omissions. Petitioner has pled the alterations and omissions with particularity and with support of an affidavit from a key trial witness. And it was also not until 1993 that Petitioner began to discover other facts complained of in his 2255 motion which form the basis for this petition: (1) Petitioner's counsel, O'Donnell, testified before the grand jury which indicted Petitioner; (2) Takiff, attorney for Petitioner's Panamanian attorney, Fonseca, is a federal undercover agent; and (3) theft of the mining equipment by Canadians assisting SEC prosecutor Kiser.

In 1984, a Canadian resident named Hoolsema backed his truck up to the Canadian mining operation and proceeded to confiscate nearly a million dollars worth of mining equipment from the mining site. Among the equipment seized were three bulldozers and a truck.

Hoolsema was an associate of Wasmund, the investigator for the British Columbian Securities Administration. Wasmund discovered the Canadian mining operation when the U.S. authorities, through Gottlief, an investigator for the SEC and Kiser, Special Assistant U.S. Attorney prosecuting Petitioner in the prior California civil case, disclosed the existence of the mining operation and that the SEC believed the operation to be fraudulent. In November of 1984, prior to the indictment, Hoolsema seized the equipment. Up until the time of the seizure of the equipment, the Canadian mining operation was an active mine. With the seizure of the equipment the

mine could not continue its operations.

Wasmund caused the government of Canada to seize approximately $450,000 worth of the Canadian mining company's money located in Canadian banks. The seizure was initiated from an investigation started by Wasmund at the direction of985 Denver indictment. Seizure of the $450,000 effectively eliminated the operating capital for the Canadian mining operation and put it out of business.

Further, Petitioner alleged that the government or its agents seized over $15 million in other property, including a major Colorado ski resort, which property was seized pursuant to judgment entered in California state proceedings in favor of the Seventh Elect Church. Petitioner alleged that the government was involved in obtaining that judgment and the subsequent seizure of property belonging to Petitioner.

2. Conflict/Ineffective Assistance of Counsel/ Government Interference With Counsel

During the late seventies and early eighties, Petitioner promoted and sold gold mine tax shelters with respect to a mine in Panama and later one in French Guiana. For this effort the SEC sought an injunction against Petitioner in 1980 in California, which suit resulted in a victory for Petitioner in 1986. *SEC v. Rogers*, 790 F.2d 1450 (9th Cir. 1986). A federal criminal tax prosecution in California followed in 1982. In an unpublished opinion the district court dismissed the case for "blatantly egregious government conduct," but the

Ninth Circuit reversed. *U.S. v. Rogers*, 751 F.2d 1074 (9th Cir. 1985). In 1984 the SEC began a grand jury investigation in Colorado.

O'Donnell and Gordon, California attorneys to whom Petitioner paid "millions of dollars" acted as Petitioner's counsel in the civil SEC case in California, the criminal tax case in California, and the criminal SEC case in Colorado. Unknown to Petitioner and the court, O'Donnell testified before the Colorado grand jury with evidence not only protected by the attorney/ client and work product privileges, but with evidence highly incriminating to Petitioner. During his grand jury appearance, O'Donnell was represented by his own counsel, Gordon, who, of course, also represented Peca, represented by Takiff, now a known federal undercover agent enlisted by the government to conduct sting operations. Based upon recently discovered evidence, Takiff, Petitioner asserts, was instructed by prosecutor Rafferty as to how to proceed in the government's best interest with Fonseca. Fonseca incriminated Petitioner. As Petitioner puts it, Fonseca "was recruited to testify falsely, as the record now shows, by government undercover agent Raymond Takiff." According to Petitioner, Rafferty instructed Takiff "as to how Fonseca had to testify to have his indictment dismissed" which testimony meant that Fonseca "had to implicate" Petitioner. The facts of this case are truly astonishing. Four years after his conviction, Petitioner discovered that his criminal defense lawyer entered into a secret agreement with the government and falsely testified before the grand

jury which indicted Petitioner in this case. The secret and false grand jury testimony not only constituted a gross disloyalty, but substantially incriminated Petitioner, and the evidence was used by the government in trial against Petitioner. Petitioner has found no reported case in which a criminal defense attorney secretly testified before a grand jury which indicted the defendant.

Moreover, this case has a history of intentional interference, intimidation and intrusion by the government into the attorney-client relationship: the California tax indictment was dismissed for such intrusion, which dismissal was reversed by the Ninth Circuit because the court found that the government's misconduct was less than outrageous. In the Ninth Circuit decision, the court noted that the district court found that the IRS special agent "intentionally sought to obtain the [attorney-client privilege] information from [civil tax attorney] Miller by suggesting threateningly that Miller's involvement in the tax shelter was the subject of a criminal investigation." *U.S. v. Rogers*, 751 F.2d 1074, 1977 (9th Cir. 1985). In addition, in this case the government indicted Petitioner's Panamanian attorney, Fonseca, who then testified against Petitioner. Fonseca, during his negotiation with the government and prior to his trial testimony in this case, was represented by none other than Takiff, who unknown to Petitioner at the time and apparently unknown to Fonseca, worked as an undercover agent for the federal government. *See, e.g., U.S. v. Shenberg*, 89 F.3d 1461, 1466-68 (11th Cir. 1996)(Takiff's undercover activities

described in detail). Takiff, an established criminal defense attorney about to be indicted for tax evasion, turned federal undercover agent, which resulted in the dismissal of charges for two of his clients but not of his third and most famous: former Panamanian President Manuel Noriega.

3. Altered Trial Transcripts

In 1993, well after Petitioner's direct appeal in this case, Petitioner first received the trial transcripts and discovered what he claims to be serious alterations and omissions. Under *28 U.S.C. § 753*, Petitioner is entitled to inspect and test by forensic expert the original transcripts, court reporter tapes and audio tapes.

As is more fully supported by Petitioner's declaration and the declaration of one of the government's star witness, Coomber, the existing transcripts furnished to Defendant for direct appeal through Wheeler, his appellate lawyer, were, according to Petitioner and Coomber, altered by change or omission in at least 12 places. As is more fully detailed in Petitioner's district court pleadings, and as supported by tape recorded conversations with four petite jurors, the jurors remember trial statements that do not appear in the trial transcripts. Thus, in support of an evidentiary hearing, Petitioner claimed a total of six witnesses re transcript alterations: Plaintiff, Coomber, and four jurors.

REASONS FOR GRANTING THE WRIT

I. THE HOLDING OF THE TENTH CIRCUIT THAT PETITIONER IS NOT ENTITLED TO A DOUBLE JEOPARDY EVIDENTIARY HEARING IS CONTRARY TO DECISIONS OF THIS COURT; THIS COURT RECENTLY HEARD AND WILL SOON DECIDE THE PRE-INDICTMENT CIVIL PENALTY/DOUBLE JEOPARDY CASE OF *HUDSON*, WHICH DECISION SHOULD CONTROL THE DECISION IN THIS CASE.

A. The Tenth Circuit Decision

The Tenth Circuit opined that Petitioner's allegations regarding the U.S. government's involvement in and responsibility for non-judicial seizure of Petitioner'S mining assets was "conclusory" and "completed unsupported by evidence." Thus, contrary to decisions of this court, including *Townsend, infra*, Petitioner was denied a *Sec. 2255* evidentiary hearing, but under an erroneous standard.

B. Overview

Recently this Court heard oral arguments in *Hudson v. U.S.*, __ U.S. __, No. 96-976, in which petitioners claim that civil penalties and other sanctions against them constitute punishment for purposes of the double jeopardy clause of the *Fifth Amendment*. In *Hudson*, pre-indictment the U.S. government sought and obtained substantial civil monetary penalties against petitioners and petitioners were disbarred from managing a federally insured bank. Petitioners argued that the civil punishment was not solely remedial but punitive, and therefore, offended the *Fifth Amendment* double jeopardy clause.

C. Law and Argument

In the case at bar, by declarations made under penalties of perjury, Petitioner has specifically alleged that the U.S. government was responsible for pre-indictment civil punishment--the non-judicial seizure and forfeiture of mining assets. Respondent has never answered these serious allegations by a counter declaration. Thus, under *Townsend v. Sain*, 372 U.S. 293 (1963), Petitioner is entitled to an evidentiary hearing because Petitioner has alleged facts which if proven entitle him to relief.

Moreover, under *28 U.S.C. Sec. 2255*, because the record does not conclusively show that the Petitioner is entitled to no relief, Petitioner is entitled to an evidentiary hearing. It is noteworthy that neither the District Court nor the Tenth Circuit classify Petitioner's allegations as "palpably incredible" or "patently frivolous or false." Rather, the Tenth Circuit agreed with the District Court in concluding that Petitioner's allegations were "conclusory" and were "completely unsupported by evidence." Yet, Petitioner's alleged uncontroverted facts outside of the record which triggered the need for an evidentiary hearing: to develop a record and resolve disputed facts. Circuit decisions, including the Tenth Circuit, which reverse and remand for a *Sec. 2255* evidentiary hearing are legion, *infra*.

In *U.S. v. Halper*, 490 U.S. 435, 109 S.Ct. 1892 (1989) this Court stated that civil sanctions constituting criminal punishment followed by a criminal indictment violates the Double Jeopardy Clause. Civil sanctions constituting

criminal punishment are those sanctions which are more than remedial in nature; that is, deterrent sanctions. Even those punishments which are remedial in nature but have some deterrent purpose may be considered punishment for Double Jeopardy analysis. *Id.* at 448-449. To determine whether a particular civil sanction is deterrent in nature, the court questions the purpose actually served by the sanction not the underlying nature of the proceeding giving rise to the sanction. *Id.* at note 7.

Petitioner alleged that the U.S. government surreptitiously seized Petitioner's property, which property was necessary for the continuation of Petitioner's business. Agents and/or representatives acting on behalf of the U.S. government successfully seized or caused to be seized equipment belonging to the Canadian mining operation as well as over $450,000 in cash from the Canadian mining company's bank accounts and over $15,000,000 in other property belonging to Petitioner. The result of the seizures was the shut down of the Canadian mining operation, thereby deterring Petitioner from continuation of the business. Such a sanction amounts to punishment and a subsequent conviction for the same conduct violates the Double Jeopardy Clause.

Incredibly, given the value of property seized, there has never has been an accounting as to what happened to the property. There are cryptic references in the trial transcript to the fact that some of the money seized was given back to investors. However, no one has ever testified specifically as to what happened to the various properties. Only through evidentiary hearing will the

truth be revealed.

Halper requires the district court to consider whether the seizure of the assets was deterrent or remedial. Petitioner concedes that there could be some remedial element of the seizure of assets; i.e., returning money to the investors. However, like *Hudson*, there is no evidence of remedial payments or costs in the record. In fact, the record is devoid of any specific documentary evidence or testimonial evidence of parties with first hand knowledge indicating what happened to the subject property. The only factual evidence before the court is: (1) the property was seiusiness. The only conclusion that can be drawn from the seizure of assets is that Petitioner was deterred from continuing his business. He was punished for promoting and selling his tax shelters. This court's decision in *Townsend* required an evidentiary hearing and application of *Halper*. Moreover, despite Petitioner's substantial reference to *Hudson*, the Tenth Circuit acted in this case without benefit of this court's decision in *Hudson*, now pending. *Compare U.S. v. Ursery*, 116 S.Ct. 2135 (1996) (forfeiture of drug proceeds).

II. THE HOLDING OF THE TENTH CIRCUIT THAT PETITIONER CANNOT BE HEARD TO COMPLAIN ABOUT PETITIONER'S ATTORNEY TESTIFYING AGAINST PETITIONER BEFORE THE GRAND JURY WHICH INDICTED PETITIONER IS CONTRARY TO DECISIONS OF THIS COURT.

A. The Tenth Circuit Decision.

The Court of Appeals held that

Petitioner's *Sixth Amendment* argument failed because:

1. Under *Kirby v. Illinois*, 406 U.S. 682, 92 S.Ct. 1877 (1972), the right had not attached because Petitioner was not yet indicted when his attorney secretly testified before the grand jury.

2. Petitioner failed to show "an actual conflict of interest that adversely affected his attorney's performance" under *Cuyler v. Sullivan*, 466 U.S. 335, 100 S.Ct. 1708 (1980).

3. Under *Strickland v. Washington*, 466 U.S. 668, 105 S.Ct. 2052 (1984), Petitioner failed to show prejudice resulting from counsel's representation.

B. Overview

Simply put, Petitioner's position is that given the magnitude of the egregious disloyalty of Petitioner's defense counsel - the secret agreement with the government and the secret and false grand jury testimony - coupled with deliberate concealment, for ten years, this duplicity, together with a pattern of governmental intrusion and intimidation with respect to Petitioner's choice of counsel, Petitioner is entitled to an evidentiary hearing as requested in his 2255 petition.[1]

---

[1] O'Donnell testified in 1984, the same year Petitioner was indicted. Petitioner was convicted in 1990, and discovered O'Donnell's infidelity in 1994, ten years after O'Donnell testified, and four years after Petitioner's conviction. O'Donnell represented Petitioner for three years after O'Donnell's grand jury testimony

The Tenth Circuit apparently failed to consider the fact that the obvious disloyalty of Petitioner's counsel in the Colorado criminal case spanned a period of at least two years, from pre-indictment grand jury testimony through trial preparation, pretrial motions, and hearings on those motions. *See, e.g.*, 1986 pretrial decision, *U.S. v. Rogers*, 642 F.Supp. 934 (D.C. Col. 1986). The alleged agreement of cooperation between Petitioner's counsel and the prosecutor clearly spanned "critical stages" of the case during which the right to counsel attaches.

Despite the egregious disloyalty of counsel, the obvious fraud perpetrated upon Petitioner and the court by defense counsel and the prosecutor, and the test for a *Sec. 2255* evidentiary hearing, *infra*, the appellate court found no basis for a hearing. Rather, the Tenth Circuit summarily concluded under *Cuyler* that Petitioner had failed to demonstrate "an actual conflict." But the actual conflict is obvious: O'Donnell testified against his client, Petitioner, and Gordon, ostensibly representing Petitioner, acted as O'Donnell's counsel during the grand jury proceedings.

First, O'Donnell's testimony is presumptively in conflict with Petitioner's best interest, otherwise, why would the prosecutor subpoena O'Donnell before the grand jury? Secondly, we know that the testimony incriminated Petitioner because Petitioner set forth specific examples as to how the testimony harmed Petitioner. On the adverse affect issue, while the

---

(1984-87).

Tenth Circuit like the District Court seemed impressed with "some success on pretrial motions" enjoyed by O'Donnell and Gordon the appellate court ignored the fact that:

1. During the pretrial "critical stage" O'Donnell, Gordon and the prosecutor hid from the Petitioner and the District Court O'Donnell's and Gordon's grand jury participation. This was a fraud upon the court. In fact, the prosecutor listed Petitioner's attorneys as trial witnesses, to which they successfully filed a motion in limine, decided at 636 F.Supp. 237, 253 (D.C. Col. 1986), where the court said:

> In the present case, if Rogers' attorneys were called as *prosecution witnesses, they would be required to withdraw under the disciplinary rules which govern attorneys' conduct. See* DR 5-102(B) (an attorney is required to withdraw from representation of a client if it is apparent that the attorney's testimony is or may be prejudicial to the client); [citing case] Thus, Rogers asserts that he will be denied his right to counsel in violation of the Sixth Amendment.

Indeed, Petitioner was denied his right to counsel because, unknown to the court, Petitioner's counsel *did* testify against Petitioner before the grand jury, and counsel did not withdraw, and the court was never informed of the obvious conflict by counsel or the prosecutor.

2. O'Donnell and Gordon never moved to dismiss on double jeopardy grounds, which motion would have led to discovery and evidentiary hearing

regarding the issues raised by Petitioner in his first argument, *supra*.

3. O'Donnell and Gordon never pressed the government to produce under *Brady v. Maryland*, 83 S.Ct. 1194, (1963) information regarding the U.S. government's pre-indictment punitive action, despite the District Court's order for production.

Thus, *Cuyler* and the conflict aside, Petitioner met the more stringent test of *Strickland v. Washington*. Moreover, despite Petitioner's allegations of intentional prosecutorial intrusion into the attorney/client relationship, the Court never examined defendant's claim, which claim requires scrutiny under the *Fifth Amendment* due process clause, *infra*.

C. Law and Argument.

1. Prosecutor's Intentional Interference With the Right to Counsel.

Implicit in the fundamental right to counsel is the right to conflict-free counsel. *Cuyler v. Sullivan*, *supra*, (counsel's conflict of interest violated defendant's *Sixth Amendment* right to counsel); *Wood v. Georgia*, 101 S.Ct. 1097, 1103 (1981) (judgment vacated, case remanded where conflict of interest may have existed). "Counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest." *Strickland, supra, at 2065* (counsel for convicted murderer not ineffective). A defendant's right to counsel would be a sham if counsel's loyalty were divided, or even suspect. Defense counsel has an ethical obligation to avoid conflicting

representation and to advise the court promptly when a conflict of interest arises during the course of trial. *Cuyler* at 1717.

Petitioner substantiated his claim with the grand jury transcript of his (presumably loyal) counsel's "secret" and "false" testimony. The fact that the government's and Petitioner's attorneys failed to disclose to Petitioner or the court the defense attorney's grand jury appearance alone raises suspicion warranting evidentiary hearing, especially where the government failed to submit a declaration which contradicts Petitioner's allegations.

Petitioner's threshold argument concerns the intentional intrusion by the government into the sacred attorney-client relationship existing between Petitioner and his defense counsel. The Tenth Circuit chose to ignore its foremost case bearing on this matter. *Shillinger v. Hayworth*, 70 F.3d 1132 (10th Cir. 1995) (conviction reversed; intrusion during trial). *Shillinger* provides the lens through which government's misfeasance must be scrutinized.

In *U.S. v. Hearst*, 638 F.2d 1190 (9th Cir. 1980), Patty Hearst's famed lawyer F. Lee Bailey, allegedly cut a book deal during the course of his defense of Hearst. In discussing the inevitable conflict of interest that resulted, the *Hearst* court relied on *Machibroda v. U.S.*, 82 S.Ct. 510 (1962), where the movant's *Section 2255* motion and affidavit made detailed factual allegations (as Petitioner did in the present case). The government countered by introducing its own affidavit. The district judge concluded without a

hearing that the petitioner's allegations were false and denied relief. This court vacated and remanded:

> This was not a case where the issues raised by the motion were conclusively determined either by the motion itself or by the "files and records" in the trial court. The factual allegations contained in the petitioner's motion and affidavit, and put in issue by the affidavit filed with the Government's response, related primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light. Nor were the circumstances alleged of a kind that the District Judge could completely resolve by drawing upon his own personal knowledge or recollection.
>
> We cannot agree with the Government that a hearing in this case would be futile because of the apparent lack of any eye witnesses to the occurrences alleged... The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record it is his right to be heard. (Citation omitted.)

Fully embracing this principle, the *Hearst* court stated, "(t)here will always be marginal cases, and this case is not far from the line. But the *specific and detailed factual assertions* of the petitioner, while improbable, cannot at this juncture be said to be incredible.

If the allegations are true, the petitioner is *clearly entitled* to relief. Accordingly, we think the function of *28 U.S.C. § 2255* can be served in this case only by affording the hearing which its provisions require." 638 F.2d at 1195. (Emphasis provided).[2]

In the present case, Petitioner, like Patty Hearst, has made specific factual allegations regarding the government's and his own counsel's, deliberate deprivation of Petitioner's *Sixth Amendment* rights. At no time has the government put forward any evidence to the contrary.

Intentional intrusion into the sanctity of the attorney-client privilege/work product and disdain for rules of ethics is, of course, nothing new for prosecutors. Witness, for example, the activity of federal prosecutors in *U.S. v. Lopez*, 4 F.3d 1455 (9th Cir. 1993) in which the attorney-client relationship was circumvented by the prosecutor. Although the Ninth Circuit found that dismissal of the indictment was not the proper remedy, the court was sensitive to the issues and suggested alternative sanctions, such as contempt or referral to the state bar for disciplinary proceedings.

This Court has held various actions by the executive branch of government as an unconstitutional interference with the right to counsel. *U.S. v. Henry*, 100

---

[2] As to the trial judge drawing upon his own recollection or knowledge," *Machibroda, supra*, here Judge Finesilver was trial judge but Judge Brimmer, who had no involvement in the trial of the case, heard and decided the *2255*.

S.Ct. 2183 (1980)(admission at trial of incriminating statements made by defendant to his cell-mate, an undisclosed government informant, after indictment and while in custody). Although in *Henry* the intrusion was post-indictment, here we have a continuing intrusion from pre-indictment through pre-trial motions. *See also, Massiah v. U.S.*, 84 S.Ct. 1199 (1964)(incriminating statements by accused without benefit of counsel after he had been indicted); *Escobedo v. Illinois*, 84 S.C.t 1758 (1964)(incriminating statements solicited by the police from an accused who was in custody, but who had not yet been indicted or arraigned). In *Escobedo*, this Court stated:

> We hold, therefore, that where, as here, the investigation is *no longer a general inquiry into an unsolved crime, but has begun to focus on particular suspect*, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolutely Constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' .... (Emphasis supplied.)

Of course, two years later, in *Miranda v. Arizona*, 86 S.Ct. 1602 (1966), this Court

held that statements by persons in custody could not be used at trial when they had not been informed of their right to counsel before being questioned. As this Court stated in *Strickland, supra*:

> The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

2. Due Process Violation; Government's Method Offends "a Sense of Justice."

In 1952 this Court, in an opinion by Justice Frankfurter, held that procedural due process prevents the government from engaging in certain activity that "shocks the conscience." *Rochin v. California*, 72 S.Ct. 205 (1952) (stomach pumping). Justice Frankfurter stated that there is a general requirement that a government prosecution "respect certain decencies of civilized conduct" and that "the community's sense of fair play and decency" must be respected. He added:

> Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.'

Compare, Moran v. Burbine, 106 S.Ct. 1135 (1986)(police deceived attorney into

believing that police would not question defendant; subsequent confessions held admissible; the challenged conduct fell short of the kind of misbehavior that so "shocks the sensibilities of civilized society.") Aside from torture and stomach pumping, what could more "shock the sensibilities of civilized society" and "offend 'a sense of justice'" than for the government to turn an accused's attorney against him and succeed in having that attorney give incriminating evidence before the grand jury that indicted the accused, and then continue to represent Petitioner through pretrial motions and hearings, all designed to deceive the accused and the district court.

III. THIS COURT SHOULD SETTLE THE ISSUE OF THE RIGHT TO COUNSEL DURING GRAND JURY PROCEEDINGS WHERE THE PETITIONER'S INDICTMENT IS IMMINENT AND WHERE, WITHOUT KNOWLEDGE OF PETITIONER AND THE COURT, PETITIONER'S COUNSEL TESTIFIED AGAINST PETITIONER.

If, despite O'Donnell's representation of Petitioner from pre-indictment through pre-trial motions, this Court is to conclude that Petitioner's right to counsel did not attach because counsel testified during grand jury proceedings which is not under *Kirby*, a "critical stage," then this Court should settle the issue of the right to counsel during grand jury proceedings, at least where the Petitioner's indictment is imminent and where, without Petitioner's and the court's knowledge, Petitioner's counsel testified against Petitioner. But first,

we examine in detail *Kirby*, to see if in fact *Kirby*, as the 10th Circuit concluded, forecloses Petitioner's argument.

In *Kirby*, the Court concluded that the right to counsel did not apply to pre-indictment identifications, stating at 417-18:

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it *is only then that the government has committed itself to prosecute and only then that the adverse positions of government and defendant have solidified.* It is then that the defendant finds himself faced with a prosecutorial forces of organized society and immersed in the intricacies of substantive and procedural criminal law.

Here, we have an imminent indictment against Petitioner who for four years prior to the indictment has been prosecuted civilly and criminally by the federal government with respect to his promotion and sale of tax shelters. It can hardly be said that "the adverse positions of government and defendant" had not been solidified during the Colorado grand jury investigation. Unlike Kirby, in this case Petitioner is not asking this Court "to import into a routine [grand jury] investigation absolute constitutional guarantee historically and rationally applicable

only after the onset of formal prosecutorial proceedings." *Id.* 418. Rather, Petitioner is urging that under the circumstances of this case, this is an occasion where the pre-indictment abuses of the government should not be placed beyond the reach of the Constitution and that therefore, it is necessary to scrutinize the government's actions *vis a vis* Petitioner's right to counsel and his *Fifth Amendment* right to due process of law.

By way of simple analogy, what if, for example, pre-indictment, Petitioner's counsel and the prosecutor conspire specifically to violate Petitioner's rights by agreeing to an indictment and conviction for a crime Petitioner did not commit and as part of the plan, counsel withdrew from the case after a hearing on pretrial motions? Would this Court then conclude Petitioner has no *Fifth* and *Sixth Amendment* right attached? Surely protection against unconstitutional pretrial confrontation is no more or less important than Petitioner's claim of conflict-free and effective counsel representing Petitioner pre-indictment through pre-trial motions.

IV. THE HOLDING OF THE TENTH CIRCUIT THAT PETITIONER IS NOT ENTITLED TO A *28 U.S.C. SEC. 2255* EVIDENTIARY HEARING IS CONTRARY TO DECISIONS OF THIS COURT AND CONFLICTS WITH DECISIONS OF THE TENTH AND OTHER CIRCUITS WHERE A PETITIONER HAS PRESENTED EVIDENCE SUPPORTING HIS CLAIM OF: (1) PRE-INDICTMENT CIVIL PENALTIES/DOUBLE JEOPARDY; (2) LACK OF CONFLICT FREE EFFECTIVE ASSISTANCE OF COUNSEL; AND (3)

ALTERATIONS OF TRIAL TRANSCRIPTS.

A. The Tenth Circuit Decision

The Appeals Court agreed with the District Court that PETITIONER had "produced absolutely no evidence to support his claim except for an affidavit signed by his co-defendant." The Tenth Circuit found that the record and filings "conclusively show that [Petitioner] is entitled to no relief" and thus, the District Court was not required to hold an evidentiary hearing.

B. Overview

There is a recurring theme in all issues presented in this petition: Petitioner claims that by way of his uncontroverted declaration, made under penalties of perjury, together with facts and exhibits of record, that he is at least entitled to an evidentiary hearing on the issues.

In addition to Petitioner's uncontroverted allegations made under penalties of perjury regarding the double jeopardy and counsel issues, Petitioner alleged that his trial transcript had been altered. Also in support of this claim Petitioner submitted an affidavit signed by a co-defendant stating that, "To the best of [his] recollection, certain testimony has been omitted from the transcript." Again it is noteworthy that neither the Tenth Circuit nor the District Court classified Petitioner's allegations as "palpably incredible" or "patently frivolous or false." Again, Petitioner was entitled to an evidentiary hearing but denied same.

C. LAW AND ARGUMENT.

1. Procedural Due Process.

Under *28 U.S.C.* § *753*, a criminal defendant has a right to a record on appeal, which includes a complete transcript of the proceedings at trial. This section gives parties not only the right to purchase transcripts of court proceedings, but also the right to inspect "original notes" and "original records:"

> The original notes or other original records and the
>
> copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person
>
> without charge.

There have been several cases involving a defendant's right to the record on appeal. *Hardy v. United States*, 375 U.S. 277, 84 S.Ct. 424, motion for modification den. 376 U.S. 936, 84 S.Ct. 790 (1964)(duties of court-appointed attorney on appeal could not be discharged unless he obtained the entire lower court transcript). Where a court reporter failed to record all proceedings verbatim, reversal of the lower court may be appropriate where "specific prejudice" resulting therefrom can be shown. *United States v. Carillo*, 902 F.2d 1405 (9th Cir. 1990)(failure of court reporter to prepare accurate and reliable transcript violated defendant's due process rights; absence of usable transcript precluded appellate review of defendant's claim that trial court's bias denied defendant a fair trial; reversed and remanded).

If a defendant is represented by the same attorney at trial and on appeal, a new trial is appropriate only if the

defendant can show that the failure to record and preserve a specific portion of the trial visits a hardship on him and prejudices his appeal. If, as here, the defendant is represented on appeal by an attorney who did not participate in the trial, a new trial is necessary if there is a substantial and significant omission from the trial transcript.

Whether there is a substantial and significant omission can be decided only after the district court has attempted to reconstruct those portions missing from the transcript. *United States v. Preciado-Cordobas*, 981 F.2d 1206 (11th Cir. 1993), citing *United States v. Selva*, 559 F.2d 1303 (5th Cir. 1977) and *United States v. Preciado Cordobas*, 923 F.2d 159 (11th Cir. 1991) (omissions from record on appeal were neither so substantial nor significant as to prevent effective appellate review).

In the present case, Petitioner represented himself at trial. On direct appeal, both Petitioner and his newly appointed counsel were severely prejudiced by the absence of a complete and accurate record of trial court proceedings. Without a complete record Petitioner's counsel could not adequately advise Petitioner in his appeal. Likewise with respect to his new counsel who appeals the denial of Petitioner's *Section 2255* motion. For example, on direct appeal Petitioner's counsel claimed lack of sufficient evidence because there was no documentary evidence which linked Petitioner to the Colorado mine. As a result of Petitioner's claimed trial transcript alterations, counsel was not able to support his argument by the trial testimony.

Petitioner is entitled to a new trial under the *Preciado-Cordobas* standard, for an "appellate attorney who was not involved in the trial often will be unable to identify and pursue irregularities that might otherwise entitle an appellant to relief. Thus, there seems to be a *presumption of prejudice to appellants* who are represented by new counsel on appeal when the record omissions are substantial and significant." (Emphasis supplied.) *Preciado-Cordobas*, 981 F.2d at 1212, citing *United States v. Stefan*, 784 F.2d 1093 (11th Cir. 1986).

Based upon the foregoing, Petitioner is presumptively entitled to full access to the tapes, notes and transcripts, forensic testing, discovery, and thereafter an evidentiary hearing. Petitioner specifically identified numerous alterations of the trial transcript.

2. Right to Evidentiary Hearing.

28 U.S.C. §2255 provides that "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the Court shall ... grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." *See e.g., Fontain v. US*, 411 U.S. 213, 215 (1973)(reversing summary dismissal and remanding for hearing because "motion and the files and records of the case [did not] conclusively show that the petitioner was entitled to no relief.") *Sanders v. US*, 373 U.S. 1, 19-21 (1963). Section 2255 provides for an evidentiary

hearing when the standards in *Townsend* v. *Sain*, 372 U.S. 293 (1963) require. Moreover, it is noteworthy that the district court judge who heard the 2255, Judge Brimmer, was not the trial judge and thus, was unfamiliar with the facts of the case.

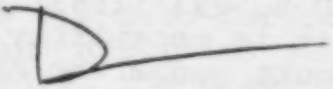
Cases in the Tenth Circuit and other Circuits which reverse and remand for a §2255 evidentiary hearing regarding ineffective assistance of counsel and similar issues are legion. *See, e.g.*, *US* v. *Blaylock*, 20 F.3d 1458, (9th Cir. 1994); *US* v. *Bartholomew*, 974 F.2d 39, 41 (5th Cir. 1992); *Henderson* v. *US*, 948 F.2d 704, (11th Cir. 1991); *Murchu* v. *US*, 926 F.2d 50, 57 and n. at 12 (1st Cir.), *cert. den.* 112 S.Ct. 99 (1991); *Estes* v. *US*, 883 F.2d 645, 649 (8th Cir. 1989); *US* v. *Marr*, 856 F.2d 1471, 1472 (10th Cir. 1988); *Stokes* v. *US*, 652 FL 1,2 (7th Cir. 1981), *cert. den.* 464 US 836 (1983); *US* v. *Barnes*, 662 F.2d 777, 783 (DC Cir. 1980); *US* v. *Essig*, 10 F.3d 968, 976 (3rd Cir. 1973).

V. SUMMARY AND CONCLUSION

The decision of the Tenth Circuit is in conflict with relevant decisions of this court regarding double jeopardy, due process, right to conflict free and effective counsel, right to examine and inspect the "original notes" and "original records" of the trial transcripts, and right to an evidentiary hearing under a *Sec. 2255* motion. For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted this 2nd day of December, 1997.

The MacPHERSON GROUP, P.C.

By 

Donald W. MacPherson
Counsel of Record
3404 W. Cheryl Dr., #A-250
Phoenix, AZ 85051
(602) 866-9566

CERTIFICATE OF SERVICE

I, Suanne Willis, hereby certify that on December 2, 1997 I caused the following copies of the Appellant's Petition for Certiorari to be served by U.S. first class mail, postage prepaid, to the following persons:

Gerald L. Rogers
(1 copy)

Thomas O'Rourke
Assistant U.S. Attorney
1961 Stout Street, #1200
Denver, CO 80294
(Get Phone number)
(3 Copies)

Dated this 2nd day of December, 1997.

Suanne Willis

SAW\A17\petcert2.rog

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA	)	
	)	No. 95-1519
Appellee,	)	(D.C. No.94-CB466)
	)	(D.Colo.)
vs.	)	
GERALD LEO ROGERS,	)	ORDER AND JUDGMENT***
Defendant.	)	

Before KELLY and LOGAN, Circuit Judges, and DOWNES,**** District Judge.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the

---

*** This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata and collateral estoppel. The court general disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

**** The Honorable William F. Downes, District Judge, United States District Court for the District of Wyoming, sitting by designation.

determination of this appeal. See Fed.R. App.P.34(a); 10th Cir.R.34.1.9. The case is therefore ordered submitted without oral argument.

Defendant was charged in a thirty-count superseding indictment with mail fraud, RICO violations, securities fraud, tax fraud, obstruction of justice, and conspiracy in connection with his involvement with two mining tax shelters in Canada and French Guiana. He fled the country and was eventually extradited from Switzerland for trial. He was convicted on ten counts of mail fraud and three counts of securities fraud and sentenced to twenty-five years imprisonment. On appeal this court affirmed defendant's conviction on nine counts and remanded to the district court with instructions to dismiss four counts based on collateral estoppel.

Defendant filed a motion to reverse, vacate, set aside, or correct his sentence, pursuant to 28 U.S.c. § 2255, with respect to which the district court denied relief.[5] The appeal raises the

---

[5] Defendant filed his §2255 motion on February 28, 1994. He filed a "Supplement to Writ of Habeas Motion" on December 30, 1994, raising a double jeopardy issue. The district court denied the §2255 motion on January 30, 1995, and denied defendant's motion for reconsideration on February 15, 1995. Neither of those orders mentioned the "supplement," nor did they address the double jeopardy issue. Thereafter, defendant filed several motions regarding the double jeopardy issue, including one asking the court to grant him summary judgment on the double jeopardy issue or

issues of ineffective assistance of counsel, double jeopardy, Brady violations, and transcript tampering which defendant asserts require reversal of his convictions or a new trial. We exercise jurisdiction under 28 U.S.C. § 1291 and affirm.

I

Defendant argues that his Sixth Amendment right to counsel was violated because he received ineffective assistance of counsel as a result of a conflict of interest that occurred when his attorneys, Pierce O'Donnell and Jeffery Gordon, secretly testified before the grand jury that returned his indictment. O'Donnell and Gordon had

---

to clarify whether the orders denying § 2255 relief and reconsideration constituted a final judgment on all issues, including double jeopardy. The district court did not respond, and ultimately defendant filed "Movant's Motion And Notice Of Hearing On Motion For Reconsideration To Conduct Hearing Concerning The Alteration Of Trial Transcripts, Or, In Alternative, Hearing For Default Judgment On Motion To Dismiss For Reasons Of Double Jeopardy Due to Movant's Immediate Liberty Interest." I R. doc 1. The district court dismissed defendant's motion for lack of merit on November 2, 1995. Defendant filed his notice of appeal on December 14, 1995. Because defendant filed his notice of appeal within sixty days, see Fed.R.App.P. 4(a), from the district court's order denying his motion to dismiss based on double jeopardy -- the last issue in the §2255 action -- we hold that defendant's appeal was timely.

represented defendant on various matters, and they were his attorneys during the grand jury investigation that resulted in defendant's indictment. O'Donnell testified before the grand jury, and Gordon represented O'Donnell, remaining outside the grand jury room. After defendant's indictment in 1984, O'Donnell and Gordon continued to represent defendant, participating in numerous pre-trial matters. O'Donnell and Gordon were granted leave to withdraw as defendant's counsel in August 1987 when defendant failed to make a court appearance and fled the country. Defendant represented himself at trial with a public defender as advisory counsel.

The Sixth Amendment right to effective assistance of conflict-free counsel, see United States v. Cook, 45 F.3d 388, 393 (10th Cir. 1995), attaches only after initiation of adversary proceedings against a defendant, in this case formal charge by indictment. See Kirby v. Illinois, 406 U.S. 682, 688-89 (1972). Thus, to the extent defendant argues that O'Donnell's grand jury testimony and a pre-indictment meeting between government attorneys and O'Donnell and Gordon violated his Sixth Amendment rights, the argument fails. Further, defendant has not demonstrated an actual conflict of interest that adversely affected his attorney's performance from the time he was charged by indictment until they withdrew following defendant's disappearance. See Cuyler v. Sullivan, 446 U.S. 335, 348

(1980)[6] The record reveals no prejudice resulting from O'Donnell's and Gordon's representation of defendant, and, therefore, defendant has not established ineffective assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 687 (1984)(requiring prejudice resulting from constitutionally deficient performance of counsel).

II

Defendant argues that his criminal prosecution after the seizure of his assets by the Canadian government and the Seventh Elect Church through state process violated his right to be free from double jeopardy.

The Double Jeopardy Clause prohibits the government from punishing twice for the same offense. See United States v. Ursery, 116 S.Ct. 2135, 2139-40 (1966). Defendant's conclusory allegation, however, that the United States government was responsible for the seizures by the Canadian government and for the state forfeitures in favor of the Seventh Elect Church, are completely unsupported by evidence. Defendant has not shown that the United States government was connected in any way with the alleged loss of his property, or that such loss was the result of punitive action.

III

Defendant cites three pieces of information that he claims the government had a duty to disclose under the doctrine

---

[6] As the district court recognized, although O'Donnell and Gordon did not represent defendant at trial, they enjoyed some success on pretrial motions before they withdrew.

announced in Brady v. Maryland, 373 U.S. 83 (1963). We agree with the district court that this claim was procedurally barred because defendant failed to raise it on direct appeal.[7] See United States v. Cox, 83 F.3d 336, 341 (10th Cir. 1996). Defendant does not argue cause and prejudice for failing to raise the issue nor does he argue a fundamental miscarriage of justice if it is not considered. Further, even if the claim were not barred it is unmeritorious. Brady requires that the evidence be material to either guilt or punishment; "the relevant standard of materiality does not focus on the trial preparation, but instead on whether earlier disclosure would have created a reasonable doubt of guilt that did not otherwise exist." United States v. Rogers, 960 F.2d 1501, 1510-11 (10th Cir.)(quotation omitted) cert. denied, 506 U.S. 1035 (1992). Defendant's conclusory allegations regarding the value of the allegedly concealed evidence in impeaching witnesses do not satisfy the materiality requirements.

IV

Defendant alleges that his trial transcript was altered. On appeal he abandons his accusations against the trial judge and the court reporter and asserts that the transcript was altered by unknown persons. The district court squarely rejected defendant's claim, finding that he "produced absolutely no evidence to support his claim except for an affidavit signed by his co-defendant Gary Coomber, stating that "to the best

---

[7] Defendant did raise an unrelated Brady issue on direct appeal.

of [his] recollection' certain testimony has been omitted from the transcript." App. at 294. We find no error in the district court's ruling on this issue.

Because we have found no error in the district court's disposition of defendant's arguments, we hold that there is no cumulative error. In addition, we reject defendant's several requests for an evidentiary hearing. The record and filings before us on the §2255 motion "conclusively show that [defendant] is entitled to no relief," and, therefore, the district court was not required to hold an evidentiary hearing on his claims. Unites States v. Simmonds, 111 F.3d 737, 746 (10th Cir. 1997).

AFFIRMED.

Entered for the Court

James K. Logan
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff/Respondent,	)	NO. 94-F-466
	)	(84-CR-377)
v.	)	
	)	
GERALD LEO ROGERS,	)	
	)	
Defendant/Petitioner.	)	

ORDER DENYING PETITIONER'S MOTION TO REVERSE CONVICTION OR CORRECT SENTENCE

This matter comes before the Court on Petitioner's Motion to Correct Sentence pursuant to 28 U.S.C. § 2255 (1988). The Court, having considered the materials on file, and being fully advised in the premises, FINDS and ORDERS as follows:

Background

On February 28, 1994, Petitioner Gerald Rogers initiated this action pursuant to 28 U.S.C. § 2255 seeking to challenge a conviction entered by then-Chief Judge Sherman G. Finesilver. Petitioner was convicted after a jury trial on thirteen counts of the thirty counts contained in the indictment.

Discussion

Petitioner Gerald Leo Rogers is no stranger to the courts of the Tenth Circuit, nor is he a stranger to the judicial system in general. In 1984, the Petitioner was charged with a thirty count indictment alleging RICO, mail fraud, securities fraud, conspiracy violations and obstruction of justice relating to a grand jury investigation. Pretrial activity continued until August of 1987, when the Petitioner became a fugitive from justice after failing to appear for sentencing on an unrelated conviction in California. The Petitioner was later captured in Switzerland and returned to the United States by extradition treaty in April of 1990. Trial to jury commenced on August 20, 1990, and several weeks later, a jury convicted the Petitioner on 13 counts of the indictment. His conviction was affirmed on appeal and the Petitioner is currently in Federal detention serving a twenty-five year sentence for conviction of these crimes "which, in essence, defrauded many individuals out of millions of dollars." U.S. v. Rogers, 960 F.2d 1501, 1514 (10th Cir. 1992), cert. denied, 113 S.Ct. 817 (1992).

Petitioner filed a direct appeal on September 20, 1991. The Tenth Circuit found that the government was collaterally estopped from prosecuting him on one of the two mail fraud schemes, but affirmed the conviction on all other counts, finding that (1) sufficient evidence

existed to support the Petitioner's conviction; (2) the sentence was not excessive; (3) that any violation of the Brady doctrine did not deprive the Petitioner of a fair trial; and (4) that there had been neither prosecutorial nor judicial misconduct.

Petitioner has now filed a rambling sixty page § 2255 motion to reverse his conviction or correct his sentence.[8] In his motion, the Petitioner attempts to establish seven different grounds which justify the correction of his sentence or the reversal of his conviction. The Court will discuss these arguments *seriatim*.

---

[8] Petitioner's apparent method of operation is to file a lawsuit containing fantastic or preposterous, utterly absurd accusations against any judge or court that disagrees with his arguments. This Court has not been immune from such tactics; Petitioner has now named the Court in a judicial misconduct suit alleging that Judge Brimmer (who has never seen Petitioner or even heard of him before this case) is a "straw man" of Judge Finesilver, who recused himself from this matter and whom the Petitioner has accused of altering transcripts from his original jury trial.

"GROUND ONE - THE GOVERNMENT CREATED A CONFLICT OF INTEREST WHICH RENDERED COUNSEL INEFFECTIVE"

Petitioner argues that while O'Donnell and Gordon (who represented the him in previous litigation as well as during the pretrial period before he fled the United States) did not represent him at trial, "the cumulative effect of their ineffectiveness [in the California prosecution] and in the instant case poisoned the blossoms that killed the roots of the trees." Petitioner seems to base his argument on the allegation that the government made a secret agreement with O'Donnell and Gordon to "subvert his defenses."

As a preliminary matter, this particular grievance is similar to the other six contained in the Petitioner's motion. The Petitioner's strategy in contesting his conviction seems to employ broad -- and sometimes bizarre -- accusations directed at those individuals associated with his case. The fatal flaw in the Petitioner's approach is that he generally fails to provide even a smidgen of credible evidence to support his accusations. The Court reminds the Petitioner that merely generating creative theories as to government plots against him is insufficient to establish grounds for a new trial. Furthermore, after carefully examining the Petitioner's

motion, the Court is left with the distinct impression that in many instances, he is more concerned with retrying the underlying case and re-arguing the subsequent appeal to the Court of Appeals than he is with pointing out specific and legally substantiated grounds for a correction of sentence. The Petitioner should note that this Court cannot -- and will not -- play such a role in the context of a § 2255 motion. See United States v. Prichard, 875 F.2d 789 (10th Cir. 1989) (Section 2255 generally cannot be used to collaterally attack issues disposed of on direct appeal); U.S. v. Warner, 23 F.3d 287 (10th Cir. 1994) (Section 2255 motions are not available to test the legality of matters which should have been raised on direct appeal).

Regarding the Petitioner's claim that the government conspired to destroy his defense by making a secret agreement with O'Donnell and Gordon, the Petitioner presents no evidence of such an alleged agreement. The Court finds that the Petitioner's unsupported allegations fall well short of the proof necessary to demonstrate an actual conflict of interest as required by Cuyler v. Sullivan, 446 U.S. 335, 348 (1980).

Second, neither Gordon nor O'Donnell represented the Petitioner on appeal. Under those circumstances, the Petitioner should have brought his claims of conflict of interest and ineffective assistance of

counsel during his direct appeal. U.S. v. Galloway, 32 F.3d 499 (10th Cir. 1994). Galloway states that in the context of a § 2255 Motion, a petitioner must demonstrate at least one of two elements before this Court can hear issues which were not raised on direct appeal: (1) that his failure to present the claim on appeal was for good cause and that his case is prejudiced as a result of that failure, or (2) that failure to review the claim will result in a "fundamental miscarriage of justice." Id. at 501. The standard for demonstrating a fundamental miscarriage of justice is quite stringent. According to the Tenth Circuit:

> It is not enough for appellant merely to establish that, absent the error, he would have been acquitted (i.e., his "legal innocence"). Rather, appellant must make a colorable showing of factual innocence. Sawyer v. Whitley, 112 S.Ct. 2514, 2519 ("[T]he miscarriage of justice exception is concerned with actual as compared to legal innocence.") . . . In the context of a noncapital case, this means appellant must make a colorable demonstration that he is factually innocent of the offense for which he was convicted. United States v.

Richards, 5 F.3d 1369, 1371 (10th Cir. 1993).

Id.

Petitioner has shown no cause for his failure to present this claim on direct appeal, nor that the failure to review the claim will result in a "fundamental miscarriage of justice." To the contrary, the Petitioner's contention in no way demonstrates his factual innocence. This claim is accordingly barred by the procedural default of Rogers' failure to present the claim on direct appeal.

Finally, the Petitioner represented himself at trial. As a matter of law, a criminal defendant cannot claim the benefit of the inadequate representation jurisprudence to the extent that he was representing himself pro se. United States v. Bailey, 952 F.2d 363, 366 (10th Cir. 1992). To the extent that the Petitioner attacks his representation before trial in the instant case, he has not demonstrated to the Court that such representation was deficient in any way. Indeed, the Petitioner's counsel had a degree of success on a number of pretrial motions. See, e.g., United States v. Rogers, 636 F. Supp 237 (D. Colo. 1986).

"GROUND TWO - PROSECUTORIAL MISCONDUCT AND JUDICIAL BIAS"

Petitioner argues that the prosecution failed to disclose several exculpatory facts in its possession in violation of the Brady doctrine. Specifically, he alleges that, (1) the attorney of his co-defendant Mario Fonseca was an undercover agent who forced Fonseca to testify falsely against the Petitioner; (2) that the witness Shirley Rigney was "an admitted embezzler;" (3) that the government aided and abetted the theft of mining equipment; (4) that witnesses favorable to the Petitioner were secretly released from subpoena by the government; (5) that the trial was unfair because of the inclusion of the "French Guiana Counts," and (6) that the trial transcripts were secretly altered by the court reporter and the prosecutors to remove "numerous derogatory statements and false representations" made during the course of the trial.

Claims (1)-(4) were not presented on appeal. Under Galloway, this Court may not consider these claims unless the Petitioner shows either cause for, and prejudice by, their omission from the appeal, or that the claims establish his factual innocence. Petitioner has shown no cause for the omission of these claims, much less that they affected the outcome of his case. Furthermore, the Petitioner

has not presented sufficient evidence to establish that these claims prove his *factual* innocence. On the contrary, he failed to demonstrate that these claims in any way weaken what the Tenth Circuit Court of Appeals called the

> "abundant evidence indicating, among other things, that the Petitioner made material misrepresentations to investors; that the Petitioner himself used deceptive methods in soliciting investors, and that he instructed others in the use of deceptions; that the Petitioner used mailings in the solicitation of the tax shelter; and that the Petitioner used falsified information on the solicitation brochures."

Rogers, 960 F.2d at 1511.

The Court thus cannot consider claims (1)-(4). The Court notes, however, that aside from the barrier established by Galloway, claims (1)-(4) are insufficiently substantiated and in some cases purely speculative.

As to claim (5), the Tenth Circuit ruled that prosecution of the Guiana scheme was barred by the doctrine of collateral estoppel. Rogers, 960 F.2d at 1510. However, the Tenth Circuit also

ruled that there was "abundant evidence" to convict the Petitioner on the Canadian scheme alone. Id. This Court accordingly rules that the Petitioner has failed to establish that the discussion of the French Guiana scheme during the course of the trial prejudiced his prosecution for the Canadian scheme.

As to claim (6), involving allegations that the trial transcript was altered, the Court discusses this allegation infra, at pages 8-9.

"GROUND THREE - NEW EVIDENCE PROVES ROGERS WAS NOT CULPABLE IN CANADA"

Petitioner argues that new evidence demonstrates his innocence of charges relating to the Canadian scheme. After carefully examining the Petitioner's argument, the Court finds that he has presented no "new evidence", but instead only new arguments as to the existing record. The supposed new evidence supplied by the Petitioner is nothing more than a renewal of the allegations he has already made regarding government misconduct, including the unsubstantiated charges that the government interfered with his attorneys and subverted his defense (see discussion under Petitioner's Claim One), that his co-defendants' attorney was an agent of the United States Government (see discussion under the Petitioners Claim Two), and that Canadian

mining equipment was stolen by the United States Government. Even assuming *arguendo* that the "evidence" provided is new, the Petitioner does not explain how it clears him of wrongdoing or demonstrates error in the Tenth Circuit's holding that his conviction was supported by "abundant evidence." Rogers, 960 F.2d at 1511. The new evidence argument is without merit.

"GROUND FOUR - PREJUDICIAL ERROR AND VARIANCE OUTWEIGHED PROBATIVE VALUE AND CREATED AN INJUSTICE"

Petitioner again argues that the inclusion by the trial court of evidence regarding the Guiana scheme prejudiced his case and resulted in his conviction as to the Canadian scheme. First, the Court has already found this argument to be without merit and directly in conflict with the Tenth Circuit's ruling that there was "abundant evidence" to convict the Petitioner of the Canadian scheme. Rogers, 960 F.2d at 1511.

Second, the Petitioner's factual support for the variance argument is nothing more than an attack on the evidence presented at trial. He attempts to exhaustively analyze trial exhibits and witnesses' testimony in the context of his theory of the case, and to convince this Court that the jury should not have found him guilty. The Court will not allow the Petitioner to re-try this case from his

jail cell, especially in light of the Tenth Circuit's ruling on his direct appeal that the evidence was sufficient to support his conviction. The Court reminds the Petitioner that absent an intervening change in the law of the Tenth Circuit, issues disposed of on appeal will not be considered on a collateral attack by a § 2255 motion. U.S. v. Prichard, 875 F.2d 789, 791 (1989).

"GROUND FIVE - ALTERATION OF TRIAL TRANSCRIPTS TO PREJUDICE COUNSEL ON DIRECT APPELLATE

Petitioner stridently argues that "the prosecutors and the Court Reporter conspired with the trial judge, Judge Sherman Finesilver and altered the trial transcript by change and omission ...". In a frenzy of accusation, the Petitioner refers to these officials as "criminals," and is apparently convinced that they conspired to remove critical portions of the record which would have conclusively demonstrated both his innocence as well as bias and grievous judicial misconduct by Judge Finesilver during the course of the underlying trial. Petitioner contends that his appeal and his legal representation during the appeal were poisoned by the alteration of the transcripts.

Petitioner's accusations are grave because they question the integrity of both a federal judge and a federal court

reporter, both of whom have rendered dedicated service to the courts for many years. In a response to the Petitioner's ominous accusations, Judge Finesilver eloquently defended the integrity of Federal District Court of Colorado as well as that of court reporter Suzanne Claar. Petitioner, on the other hand, has produced absolutely no evidence to support his claim except for an affidavit signed by his co-defendant Gary Coomber, stating that "to the best of [his] recollection" certain testimony has been omitted from the transcript. That is hardly enough evidence to support such serious charges against the judge and his court reporter.

Based on the above, this Court must balance the credibility of the Petitioner against that of Judge Finesilver and Ms. Claar. Petitioner is a convicted felon who jumped bail, fled the United States and remained a fugitive from justice until apprehended on foreign soil. Rogers, 960 F.2d at 1504. Not including the current litigation, the Petitioner has been convicted of fraud in California after bilking investors out of over a million dollars in an outlandish scheme involving "investments" in the production of feature films. Petitioner also had a judgment of $2.5 million entered against him for relieving a small church of its funds while he served as its "business manager." See Seventh Elect Church in Israel v. Rogers, 688 P.2d 506 (Wash 1984). Against

this background, the Petitioner asks this Court to join him -- without any supporting evidence -- in accusing a federal judge and a veteran court reporter of dishonesty and conspiracy. The Court refuses such a preposterous request and finds squarely against the Petitioner on his claim that the trial transcripts were altered.

More importantly, the Court notes that the Petitioner's charges against Judge Finesilver and Ms. Claar have been investigated and it has been determined that there is absolutely no evidence to support the Petitioner's allegations. While the Petitioner may have enjoyed a degree of success convincing innocent investors to believe the impossible, he will find this Court more difficult to convert to his view of reality; this tribunal, as a court of law, must base its judgments on *evidence* as opposed to bombastic accusation. Furthermore, the Petitioner's apparent strategy of repeatedly hurling groundless charges against any judicial official who dares rule against him under the hope that something will eventually stick is a flagrant abuse of the judicial process.[9]

---

[9] In a letter addressed to this Court, the Petitioner stated:

"I have been a political prisoner of a renegade faction of the U.S.

Such abuse should not remain immune from sanctions and/or injunction from further filings.

"GROUND SIX - NEW MAIL FRAUD LAW PROVIDES THAT IF TRANSFER OF MONEY OR PROPERTY WAS NOT MADE DIRECT TO MOVANT, TITLE 18 U.S.C. § 1341 WAS NOT VIOLATED"

Petitioner argues that the investor's money was not paid to him directly, that the investors received "valuable consideration for which they paid", and

---

> Government for five years ... In as much as, you have only recently been recruited to assist ... possibly your fresh and cool perspective can perceive the wisdom of resolving our mutual problem before your power is polarized ... If I do not receive an order setting aside my conviction or an order for discovery, as required by law, by December 23, 1994, then I will conclude that you have chosen to participate with the other eleven judges to deprive me of my freedom."

On January 3, 1995, the Petitioner followed through with his threat and named this Court in a Complaint for Judicial Misconduct.

that because there was no monetary loss his conviction should be reversed.

The Court finds this to be another veiled attack on the sufficiency of the evidence, which this Court will not consider in light of the Tenth Circuit's holding on this matter. Rogers, 960 F.2d at 1511. Furthermore, the Petitioner's argument is in direct conflict with Tenth Circuit law which states that no pecuniary loss need be shown to support a mail fraud conviction. U.S. v. Kelley, 929 F.2d 582, 585 (10th Cir. 1991). This claim is without merit.

THEREFORE, it is

ORDERED that the Petitioner's Motion to Reverse Conviction, Vacate, Set Aside or Correct Sentence by Movant Pursuant to Title 28 U.S.C. Section 2255 be, and the same hereby is, DENIED; and it is further

ORDERED that Gerald Leo Rogers, having abused the Court, the court processes, and the officers of this Court, by making baseless, groundless and preposterous accusations, all of which are entirely unsubstantiated, be, and he hereby is, restrained from further such abuse of the United States District Court for the District of Colorado, in that he is restrained from filing any further pleadings in any matter before this Court in which he makes charges or accusations against any of the officers of this Court

without first obtaining, and filing concurrently therewith, the written consent first had and obtained thereto, to such filing, of the Chief Judge of this Court.

Dated this 27th day of January, 1995.

UNITED STATES DISTRICT JUDGE

APPENDIX C

FIFTH AMENDMENT to THE UNITED STATES CONSTITUTION

No person shall ... be deprived of life, liberty, or property, without due process of law ....

SIXTH AMENDMENT to THE UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to ... have the Assistance of Counsel for his defense.

28 U.S.C. §753

§753. Reporters

(b) ...

The original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge.

cont'd.

28 U.S.C. §2255

§2255. **Federal custody; remedies on motion attacking sentence**

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, ... or [that the sentence] is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

* * *

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.